80-647

No. 80-_____

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BILL PIERCE, G. FRED SHIRLEY and RANDALL CALLAHAN, suing on behalf of themselves and all participants of the NECA-IBEW WELFARE TRUST FUND WORKING IN JURISDICTION LOCAL IBEW 175,

Petitioners,

vs.

NECA-IBEW WELFARE TRUST FUND,

Respondent.

PETITION FOR WRIT OF CERTIORARI To The United States Court of Appeals for the Sixth Circuit

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S. DEL FUSTON,
609 Maclellan Building
Chattanooga, Tennessee 37402
(615) 266-6423
Attorney for Petitioners

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS FOR REVIEW

This case involves an employee welfare trust (medical and hospitalization plan).

1. Can such a trust fund take away earned or vested eligibility to benefits by a retroactive amendment to its rules of eligibility?

The District Court and Circuit Court of Appeals said YES.

2. Is funding of all promised benefits of the fund plan required by federal law (ERISA)?

The District Court incorrectly considered funding. The Sixth Circuit adopts the District Court's opinion.

PARTIES

The captions on the cover and page 1 contain the names of all parties.

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WORKING IN JURISDICTION LOCAL IBEW 175,
Petitioners,

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Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals for the Sixth Circuit

OPINION NOT OFFICIALLY REPORTED

The opinion of the U.S. District Court, Eastern District of Tennessee, Southern Division, was not officially reported. It was published by the B.N.A. Labor Service at 189 B.N.A. -B.P.R., D-1.

The Sixth Circuit adopted the District Court's opinion and was not published.

The above opinions appear in the Appendix attached hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on May 12, 1980. A timely petition for rehearing en banc was denied on July 24, 1980, and the petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 1022. Plan description and summary plan description

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

§ 1102. Establishment of plan

(b) Every employee benefit plan shall -

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter.

§ 1104. Fiduciary duties

(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments are consistent with the provisions of this subchapter.

STATEMENT OF THE CASE

The District Court found jurisdiction based upon the Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, et seq., and the Labor Management Relations Act as amended, 29 U.S.C. § 186(e).

This case was tried in the District Court in an unusual manner. The case had been set for trial on December 5, 1977. A few days before, the petitioners, plaintiffs below, had filed a motion for summary judgment with supporting affidavits and discovery depositions. When the case was called, the Court stated the pleadings had been read but not the exhibits, and it appeared most facts were not in dispute. There was a discussion as to whether respondent would submit any affidavits. The Court then permitted the respondent's witness to be heard in open court, stating the Court would consider all affidavits and depositions on file. The District Court's opinion states the case was tried without a jury.

This petition seeks to review the judgment of the District Court arising out of violation of fiduciary duties with regard to administration of a welfare trust fund.

The respondent, defendant below, is the NECA-IBEW Welfare Trust Fund, hereinafter referred to as did the District Court as the "Decatur Fund." This Fund is a multi-employer, multi-union pooled trust fund which pays medical and hospitalization benefits and is administered by a Board of Trustees composed of one union and one employer trustee from each wage area. A "wage area" is defined in the trust documents as an area included within the geographical limits of a local union's jurisdiction. There were approximately thirty-five (35) wage areas that had joined this fund. In each wage area, the local union negotiates the contract with the local chapter of the National Electric Contractors Association. Once master contracts are negotiated, they are then formally executed between the local and the individual contractor.

Prior to July 1, 1971, the International Brotherhood of Electrical Workers, Local 175, and Chattanooga NECA provided in their master contract for payment of twenty ($.20) cents per hour worked for each covered electrician to be paid into a new Chattanooga health and welfare trust fund, "NECA and IBEW Local 175 Health and Welfare Trust Fund," hereinafter referred to as the "Chattanooga Fund." The Chattanooga Fund investigated the possibility of entering into a contract for benefits with an insurance company. It also considered the possibility of becoming self-funded. It ended up joining the plan of the Decatur Fund, effective July 1, 1971. The Decatur Fund's plan is typical of all craft union trust plans.

Prior to July 1, 1971, the Decatur Fund furnished its summary plan document to the Chattanooga Fund, covering the rules of eligibility and benefits of the plan. The plan in effect at the time was dated May 1, 1971. The minimum number of hours for initial coverage in the Decatur Fund at that time was 500 hours in two successive quarters. The participants in the Chattanooga Fund had already worked over 500 hours in such a period; accordingly, the Decatur Fund permitted the Chattanooga wage area to buy into the Decatur Fund for immediate coverage which would begin July 1, 1971. The total sum was 500 times the contribution rate, times the number of eligible participants. The petitioners became participants and beneficiaries of the Decatur Fund. The petitioners immediately had six months of future eligibility to the benefits provided by the plan even if they never worked again. By working so many hours each quarter thereafter, a participant could gain up to nine months of future coverage. This period of continuing eligibility is often referred to in the record as "extended benefits," "extended coverage," or "accrued eligibility."

In 1975, a very large wage area out of Joliet, Illinois, withdrew from the Decatur Fund, and the Fund acknowledged its liability, and the participants were paid the extended coverage of three, six, or nine months. It cost the Decatur Fund

approximately seven hundred thousand ($700,000.00) dollars in extended benefits when Joliet withdrew. The Decatur Fund suddenly found itself in a deplorable status for the reason that it never funded the extended coverage liability. It appears that the professional staff of the Decatur Fund was greatly concerned over who should take the blame. The plan of the professional staff is clear from the consultant's report and especially from the minutes of the January 15, 1975 meeting. The professional staff discussed this liability caused by the withdrawal of a wage area. Mr. Blomquist explained to the trustees that it was through no fault of their own but was due to the new 1975 AICPA guidelines which had just come out. These guidelines had come out in 1970-1971. The professional staff convinced the trustees that it was perfectly legal to pass a retroactive amendment to eliminate all this liability.

Due to the expense and because the Decatur Fund had provided no funding as petitioners contend is required by ERISA, the Decatur Fund passed two amendments on January 15, 1976. One, to the trust instrument, would give the trustees the authority to make a forfeiture of accrued eligibility in the event a wage area withdrew. The amendment was passed to be effective retroactively to January 1, 1976, and was as follows:

> In the event that a collective bargaining agreement requiring contributions to the Welfare Fund is not succeeded by a collective bargaining agreement requiring contributions to the Welfare Fund, then a participating Employer which is no longer obligated under the terms of a collective bargaining agreement to make contributions to the Welfare Fund shall cease being a participating Employer on the date that the obligation terminates, and its employees shall not be Eligible Employees as to any claims incurred on or after the thirty-first calendar day following the date on which the obligation to contribute terminated.

Immediately thereafter, the trustees amended the summary plan as follows:

Termination of Benefits

4. On the 31st day after the Local Union in whose jurisdiction you are working ceases its participation in the Plan.

At the time the amendments were passed, the Chattanooga Fund was already considering withdrawing from the Decatur Fund. The Chattanooga Fund finally did withdraw on December 31, 1976, when a new master contract was negotiated between Local 175 and Chattanooga NECA providing that contributions would no longer be made to the Decatur Fund.

Petitioners filed this class action suit contending that the Decatur Fund violated the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, et seq. The petitioners contend that the Decatur Fund violated its fiduciary duties by passing a retroactive amendment reducing their extended coverage from either three, six, or nine months to just 31 days without giving them advance notice and an opportunity to withdraw. The petitioners also contended that the trustees violated their fiduciary duties in not having provided for funding as required by its own documents as well as the requirements of ERISA. The Decatur Fund provided in its trust instrument as follows:

> The trustees shall by resolution establish and carry out a funding policy and method consistent with the objectives of the trust agreement and the requirements of any applicable federal law.

ARGUMENT

The Decision Below is Contrary to Federal Law

In the case of *Crawford* v. *Cianculli,* (March, 1973) 357 F. Supp. 358, the Court observed that one of the most recurring problems facing a labor-management relation was the hardship caused by the loss of benefits by hundreds of thousands of American workers who relied upon trust plan rules of eligibility. The Court pointed out that methods of avoiding these losses had been the subject of inquiry by Congress for three years, which would provide a means toward solving and avoiding these problems. The Court observed that ERISA had just been introduced in Congress. The District Court was discussing a pension controversy, but ERISA applies to welfare plans just as well.

It is believed that at least ninety-five (95%) percent of all craft unions have negotiated welfare plans covering millions of construction workers. It is the principal means by which workers provide medical insurance for themselves and their dependents. The central theme of ERISA is to insure any employee he will receive what has been promised him upon completion of the eligibility requirements. To accomplish this, ERISA provides for many safeguards.

Section 29 U.S.C. §1102 (b)(1) provides every plan shall establish a funding policy. The obvious purpose is to provide assets to pay for the benefits that have been promised. If a Fund has the money, it usually does not attempt to take away earned eligibility rights. When the Chattanooga Fund joined the Decatur Fund, there was no question under the Fund documents if the Chattanooga wage area withdrew, the participants would receive the extended coverage.

The Decatur Fund admitted it never funded this extended coverage.[1] It admitted that if all 35 wage areas withdrew, it could only pay one-half (½) of the extended benefits, or just over three (3) months of the regular benefits. The contention of the Decatur Fund was that there were no legal requirements for such funding.

The District Court said funding could be provided by reserves or current income. We agree, but you have got to have enough assets, reserves or current income, to pay for the promised benefits. Proper funding simply means having enough assets to cover all liabilities, including extended coverage, should the Fund terminate on any given date.

All of the above argument was submitted to the Court of Appeals in petitioners' original brief and especially in the Petition for Rehearing which is in the Appendix attached. The Court of Appeals denied the Petition for Rehearing without comment.

It was the lack of funding which precipitated and caused five-months loss of medical coverage to the participants by the controversial forfeiture amendment.

The Decision Below Conflicts in Principle With the Decisions of Other Federal Courts

In *Yellow Freight Systems, Inc.* v. *I.A.M. National Pension Fund* (D.C. Cir., 1977), 553 F.2d 352, a pre-ERISA case, a jointly trusteed pension plan contained a provision stating that if a bargaining unit withdrew from the plan, the past service of the employee in that unit would be cancelled. The trustees amended this provision, effective July 1, 1973, to provide that in a case of a withdrawal all future service would also be cancelled.

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[1] See "Excerpts From Record" in Appendix attached.

A company did withdraw from the fund, as of June 30, 1973, after the employees elected to change bargaining representatives, and when one of the employees subsequently applied for a pension, his application was denied.

In the fourth paragraph of the D.C. Circuit decision, the Court holds the pension became vested in a participant when the eligibility requirements were met. Of course, the pension could not be granted until the participant reached retirement age and made application in the required manner.

The Court decided the case on advance notice and reserved decision whether a vested interest could even be forfeited. (See tenth footnote to case). The Pension Fund had given notice to the participant he would have 30 days to take the pension which actually turned out to be only 17 days.

The D.C. Circuit stated the new rule could rationally be applied only to future events. That it was arbitrary and capricious for the trustees to apply retroactive the amendment. In speaking of advance notice, it was held the plaintiff should have been given a reasonable notice or opportunity to retire and receive the benefits before the forfeiture of his credits were revoked. The Court stated:

> At a minimum, in order to divest a person in Norton's position of any of his service credits, he must be given a rationally calculated opportunity to elect between retiring and taking pension based on all of his credited service or continuing in employment subject to "a loss of pension rights."

There are unpublished decisions of district courts holding the same. One such case is *McCoy* v. *Mesta Machine Co.*, Civil Action No. 77-1046 (W.D. Pa., Oct. 23, 1978), which was published in the Legal-Legislative Reporter published by the International

Foundation of Employee Benefit Plans in Volume 12, No. 12, December, 1978.[2]

The District Court did not seem to understand petitioners' contention as to advance notice. On page 8 of the District Court's opinion, it was noted that the Chattanooga wage area did not withdraw until nine months after the amendment was passed. This was admitted. Petitioners admit eligibility rules may be changed. Petitioners contend a loss of rights if the wage area withdraws from the plan can be imposed provided the new condition goes into effect after the accrued rights have expired. If the Decatur Fund had wished to change its extended coverage, it could have done so by giving reasonable notice; that beginning with the next quarter, participants would not be earning the rights of extended coverage in the event the wage area withdrew. Thus in nine (9) months (after notice), the Decatur Fund would have eliminated all liability for extended coverage or accrued eligibility liability.

The Sixth Circuit understood petitioners' contention of advance notice but stated advance notice was not required, and accrued rights or vested rights could be eliminated by an amendment which would be retroactive in nature. The Sixth Circuit

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[2] The Pennsylvania District Court holds that actual retirement is a condition to the payment of benefits but is not a condition to vesting of interest in the plan. The Court noted that an employer could not amend the terms of a retirement plan by imposing an added requirement to those employees who had already qualified under the plan. The Court emphasized "advance notice." In the opinion of the Court, it was stated as follows:

> On whatever theory we use, vested rights, unjust enrichment, or advance notice, we think the employee's right is limited to his benefits under the plan as they existed before the amendment.

The Court concluded that ERISA imposes a duty on trustees to notify affected parties of the amendment so that they may decide whether they wish to take advantage of present conditions.

noted the petitioners' contention of discrimination against them as a class. The Sixth Circuit adopted the District Court's opinion which does not mention this contention. The Sixth Circuit, in the only footnote of its opinion, noted the amendment also constituted an alteration of benefits. It appears the Sixth Circuit approves of this discrimination not only against the petitioners as a class but also against individuals within this class. Some of the individuals in this class had three months of extended coverage, and some had nine months of extended coverage, depending upon their work records. The Sixth Circuit holds it is perfectly legal to reduce whatever extended coverage the individual petitioners had to just 31 days.

The District Court emphasizes on page 3 of its memorandum and elsewhere in its opinion the right of the trustees to make changes in the eligibility requirements at any time based upon Exhibit No. 5, page 5. It was pointed out to the Sixth Circuit this provision, which was in the 1969 plan, had been eliminated in the 1970 document, and especially in the 1971 document, when the Chattanooga wage area joined the Decatur Fund. It was pointed out to the Sixth Circuit how the District Court was probably misled on page 16 of petitioners' brief. The briefs in the Sixth Circuit were requested to be made a part of the entire record.

Apparently, the Sixth Circuit considers the incorrect contract interpretation as unworthy as the Sixth Circuit holds if the trust document does not have such a provision, the trust can pass such a retroactive provision giving you the authority at any time.

Severity of Decision

Finally, the District Court held the Sixth Circuit pre-ERISA case of *Local Union No. 5, etc.* v. *Mahoning and Trumbull, etc.* (1976) was quite persuasive. In the *Mahoning* case, the Sixth Circuit had a similar set of facts but had no equitable rules it

could utilize. That case was tried upon Section 302 of Taft-Hartley (29 U.S.C. §186). The court stated that it was particularly unwilling to invalidate the amended rule, whereas there was no intimidation of bribery, extortion, or union misuse of funds which would strike at the purpose of §186.

Of course, the Sixth Circuit had a reason for citing the supporting decisions. One case was *Moglia* v. *Geoghegan,* (2nd Cir. 1968) 403 F.2d 110, cert. den. 405 U.S. 955. In *Moglia,* the Court admits the harshness of its decision by, among other statements, observing in the last paragraph, "Our construction of §302 may work a hardship in the instant case." Another case cited twice was *Crawford* v. *Ciancuilli,* 357 F. Supp. 358. The District Court in *Crawford* states that the Supreme Court had not given the federal courts authority to utilize equitable rules as was permitted in collective bargaining contract interpretation. That court was critical of Congress because it had not enacted ERISA at the time.

It was the interpretation of some lawyers that *Mahoning* was somewhat harsh for taking away earned rights, but these lawyers understood why, based upon the law at that time. The Sixth Circuit in *Mahoning* near the end of the decision indicated that if the plaintiffs were entitled to relief it would have to be under state law.

The forfeiture clause adopted by the Decatur Fund makes it extremely difficult, if not almost impossible, for any union to ever withdraw, no matter how compelling the desire. This is for the reason that the participants would be without medical and hospital coverage for themselves and their families until the employees worked the required initial eligibility hours in another plan, usually 600 to 800 hours in a six-month period. Based upon the forfeiture clause of the Decatur Plan, the participants would have only 31 days of extended coverage and then could be without coverage for five months.

The National Interest

The International Foundation of Employee Benefit Plans is the only known organization that regularly holds seminars for beginning trustees, advanced trustees, administrators, consultants, and attorneys. The Foundation holds some type of seminar at various places throughout the United States six times per year. The annual meeting is the only known one which has a legal seminar for fund attorneys. It is estimated that approximately 5,000 trustees representing various trusts throughout the United States attend this meeting. Perhaps 300-400 attorneys attend.

So scarce are the decisions under ERISA and Taft-Hartley on the issues involved herein that these trustees look for guidance from any source. The District Court's decision in this case, while not officially reported, is reported at 189 B.N.A. -B.P.R., D-1. Generally, the trustees are familiar with the District Court case. At the annual meeting of the International Foundation, there is one topic which is popularly attended. It is called, "Recent Decisions," and highly specialized attorneys in this field present all of the important decisions of the previous year with their comments. The lower court's decision appeared in the 1978 written "Recent Decisions" review of the important 1978 decisions. Undoubtedly, at the Foundation annual meeting in November of this year the Sixth Circuit decision will be thoroughly discussed among trustees.

At the 1976 annual meeting of the Foundation, the Sixth Circuit decision of *Mahoning* was thoroughly discussed. Both the principal attorney for the respondent and for the petitioners attended that meeting as most all other annual meetings. It is respectfully submitted that under pre-ERISA law, lawyers could understand the decision in the *Mahoning* case. It was difficult to explain the decision to the trustees and almost impossible to explain it to participants. Participants, when they complete the rules of eligibility, consider they have earned or vested rights to

the benefits, whatever they may be. The participants realize that, based upon the economy, benefits may go up or down, but that the benefits should be shared equally by all participants.

At the present time, the general interpretation based upon the District Court and Sixth Circuit decision is that trustees can pass an amendment retroactively causing a forfeiture of earned rights. Although the trustees were at fault by not providing proper funding, probably due to an oversight of its professional advisors, the trustees have the right to correct the same at the expense of a class of participants.

It is the contention of the petitioners more consideration should be given to the participants than the trustees, especially if the trustees were at fault by not providing proper funding. Had the trustees provided proper funding, this case would never have arisen. If the trustees can pass retroactive amendments to take care of their mistakes, rules of eligibility will mean nothing.

The provision of ERISA (29 U.S.C. §1022) for all funds to place in writing how a participant gains or loses eligibility is rendered a nullity. Under the interpretation of the lower court, if an employee gains what he thinks is eligibility, it can be taken away from him retroactively.

It is agreed that trustees should consider the viability of their fund. It is respectfully submitted, it is more important for the courts to consider the viability of all such funds. This case will be guidelines for trust funds for years to come.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District Court, Eastern District of Tennessee, Southern Division, and the Sixth Circuit which affirmed the District Court without comment.

Respectfully submitted,

S. DEL FUSTON
609 Maclellan Building
Chattanooga, Tennessee 37402
Counsel for Petitioners

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

CIV-1-77-21

Bill Pierce, et al.

v.

NECA-IBEW Welfare Trust Fund

MEMORANDUM OPINION

(Filed Apr 6 1978)

This is an action for declaratory and injunctive relief arising out of alleged violation of fiduciary duties with regard to the administration of a welfare trust fund. The plaintiffs allege that by denying them certain benefits under the welfare trust fund the defendant violated the following statutes: 1) Section 302 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186; and 2) the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* The parties having waived trial by jury, the lawsuit was tried before the Court sitting without a jury. The Court now enters the following findings of fact and conclusions of law based upon the full record in the lawsuit.

Before considering the case on its merits, the Court notes that the plaintiffs have moved to amend their complaint. It appearing that the proposed amendments would serve to clarify the

plaintiffs' position and would work no hardship or disadvantage upon the defendant and for good cause shown, the motion to amend will be granted.

This lawsuit having arisen under 29 U.S.C. § 186 and 29 U.S.C. §§ 1001 *et seq.*, the Court jurisdiction over the action pursuant to 29 U.S.C. §§ 186(e) and 29 U.S.C. § 1132(e)(1).

This case arises out of a dispute over the administration of a welfare trust fund, the NECA-IBEW Welfare Trust Fund, the home office of which is located in Decatur, Illinois, and which will be referred to herein as the "Decatur Trust" or the "Decatur Fund". The Decatur Trust generally provides money for hospitalization and other medical expenses of its participants as well as other benefits (See Ex. #8).

The Decatur Fund is a multiemployer-multiunion pooled trust fund. A "multiemployer" fund is one to which several employers contribute. Multiemeployer funds are typically created pursuant to a master contract negotiated by a local union with a group of employers under which the employers are required to contribute to a fund established for the benefit of their qualified employees. A "multiemployer-multiunion" fund results from employers from several such bargaining units (sometimes referred to as "wage area groups") contributing to a single centralized welfare trust fund. As a multiemployer-multiunion fund the Decatur Fund exists for the benefit of more than seventeen thousand (17,000) employees of contributing employers. It is self-insured for all benefits and must pay all claims out of its income and reserves. The Fund is administered by a Board of Trustees composed of employer and union representatives and is governed by an Agreement and Declaration of Trust ("Agreement"). The trustees are required by the Agreement to promulgate eligibility rules for participation in the Fund. The Fund is a proper defendant in this lawsuit by virtue of 29 U.S.C. § 1132(d)(1).

The named plaintiffs in the present action were each participants in the Decatur Fund for some time between July 1, 1971 and December 31, 1976. During that same period, the named plaintiffs were also members of Local 175 of the International Brotherhood of Electrical Workers ("Union" or "Local 175"). Local 175 has its offices in Chattanooga, Tennessee. This case has been certified as a class action in conformance with Rule 23 of the FEDERAL RULES OF CIVIL PROCEDURE. Accordingly, the named plaintiffs bring this lawsuit in their own behalf and in behalf of all participants of the Decatur Trust who are in the jurisdiction of Local 175, there being a total of 265 participants within the class. Appropriate class action notice having been given the Local 175 participants, only one, Jackman D. Creech, Jr., elected to opt out of the class (*See* Court File #12).

The plaintiffs' participation in the Decatur Trust appears to have come about as a result of a 1970 contract between the Union and the association of electrical contractor employers in the Chattanooga, Tennessee area. That association is known as the East Tennessee Chapter, Chattanooga Division, NECA, Inc. ("Chattanooga NECA") and is affiliated with the National Electrical Contractors Association ("NECA"). The 1970 contract provided that employers would make contributions to a health and welfare plan for the benefit of their employees. In compliance with the contract, the Union and Chattanooga NECA established a welfare trust fund entitled the NECA-IBEW 175 Welfare Fund ("175 Fund"). The 175 Fund accumulated employer contributions until July 1, 1971 at which time the trustees thereof decided to affiliate the participants of the 175 Fund with the Decatur Trust. Consequently, on July 1, 1971 former participants in the NECA-IBEW Welfare Fund became participants in the Decatur Trust. At the time that Local 175 joined the Decatur Fund the following provision regarding the trustees' right to make changes in the benefit and eligibility requirements was a part of the plan document:

> "This document will be the sole document used in determining benefits to which covered individuals are eligible and may be amended from time to time by the trustees to reflect changes in benefits or eligibility requirements." (Es. #5, p. 5).

A similar provision was contained in the Decatur Fund Trust Agreements or Plan Documents at all times relevant to the issues in this lawsuit.

From July 1, 1971 until December 31, 1976 Chattanooga NECA employers contributed to the Decatur Fund. By agreement between Chattanooga NECA and Local 175, the parties elected to leave the Decatur Fund and enter another fund and the employers stopped contributing to the Decatur Fund on December 31, 1976. According to the terms of the Agreement and Declaration of Trust of the Decatur Fund, as in force upon December 31, 1976, participants whose employers ceased contributing to the Fund would continue to receive benefits from the Fund but only for thirty-one days following the final employer contribution. Accordingly, benefits under the Trust were terminated for members of Local 175 on January 31, 1977.

At the time the Local 175 joined the Decatur Fund in 1971 and at all times thereafter until January 15, 1976, the Trust Agreement under which the Plan operated provided that employee benefits would terminate for any participating employees either three, six or nine months after the employer ceased making contributions on behalf of the employee, the benefit termination date being determined by the number of hours worked by the employee in preceding quarters and for which contributions had been made to the Fund. For purposes of clarity and brevity, this period of continuing eligibility for benefits is often referred to in the record as "extended benefits" or "extended coverage". It is the Decatur Fund Trustees' action on January 15, 1976 in reducing this "extended liability" to a period of 31 days that forms the crux of this lawsuit. On

January 15, 1976, the Board of Trustees amended the Plan, effective January 1, 1976, to add the following provision at Article I, Section 4E:

> "In the event that a collective bargaining agreement requiring contributions to the Welfare Fund is not succeeded by a collective bargaining agreement requiring contributions to the Welfare Fund, then a Participating Employer which is no longer obligated under the terms of a collective bargaining agreement to make contributions to the Welfare Fund shall cease being a Participating Employer on the date that the obligation terminates, and its employees shall not be Eligible Employees as to any claims incurred on or after the thirty-first calendar day following the date on which the obligation to contribute terminated."

The effect of this amendment was to reduce to 31 days the period of time during which some of the plaintiffs were eligible to receive benefits from the Trust following the termination of payments to the Fund upon their behalf by their employer (Ex. #4).

This change in the extended benefits was noted in the July 1, 1976 edition of the "Summary Plan Description" distributed plan participants (Ex. #8, p. 23). The Fund has continued to pay all claims filed by Local 175 members for benefits due or losses incurred prior to January 31, 1977. Although the record is not clear that any particular union member sustained any particular financial loss as a result of the change in the Plan, the case was practiced upon the assumption that there were such financial losses.

The present lawsuit arises out of the adoption of Article I, Section 4E. The plaintiffs allege, and the defendants deny, that by so amending the Agreement, the trustees of the Decatur Fund violated both Section 302 of the Labor-Management Rela-

tions Act of 1947, 29 U.S.C. § 186 and the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* It is necessary, therefore, for the court to consider the events surrounding adoption of the amendment.

As a multi employer-multi union pooled trust fund, the Decatur Trust included participants from several local unions. One such local was Local No. 176, IBEW, of Joliet, Illinois ("Local 176"). On June 1, 1975 Local 176 withdrew from the Decatur Trust. As a result of that withdrawal and as a result of the Fund's continuing obligation to pay extended benefits for a period of three, six or nine months to the members of the Joliet Local after withdrawal of that local from the Fund, the Fund was required to pay some $700,000 in such extended benefits. Prior to that time the Fund had paid benefits from current revenues, no reserves having been established to pay these "extended benefits". The Trust's consultant, Mr. Richard Bloomquist of the firm of R. N. Bloomquist and Company, became concerned about the effect of possible future withdrawals upon the financial condition of the Trust. Mr Bloomquist also became concerned about the effect of certain accounting guidelines (which were promulgated by the American Institute of Certified Public Accountants) upon the liabilities of the Trust. Accordingly, Mr. Bloomquist examined the effects that withdrawals of other locals might have upon the Fund in order to make recommendations for action to the Board.

Mr. Bloomquist reported his findings to the Board at its January 15, 1976 meeting in Atlanta, Georgia. At that meeting Mr. Bloomquist, together with the Fund attorney, Mr. Hugh McCarthy, recommended adoption of an amendment to the Agreement and Declaration of Trust which became Article I, Section 4E. Mr. McCarthy reported that as of January 1, 1976 the Fund's liabilities resulting from "eligibility earned by employees" totalled approximately $7,600,000 (Minutes of January 15, 1976 NECA-IBEW Welfare Trust Fund Board of Trustees, p. 3). Mr. McCarthy further reported that after the

withdrawal of Local 176 and the concomitant cessation of Local 176's employers' contributions, the Fund made payments of approximately $700,000 to Local 176 members. Mr. Bloomquist reported that similar future payments would be greatly reduced if the proposed amendment were adopted. By way of example he stated that upon adoption of the amendment, the Fund's liability to the members of a hypothetical 500-member terminated local would be reduced from $232,500 to $26,000 (*Id.* at p. 4). Upon the additional recommendation of the Trustees' Steering Committee and upon motion by that Committee's chairman, the trustees adopted the amendment. A representative of Local 175 participated as a Fund Trustee at this meeting.

Upon this state of the record the plaintiffs contend that the trustees' action on January 15, 1976 in purporting to reduce the extended liability benefits due under the Plan from three, six or nine months to only 31 days was unlawful and a breach of their fiduciary duties in that (1) the right to such extended benefits "accrued" or "vested" in those union members who had worked the prerequisite number of hours in the quarters prior to withdrawal of the union from the Plan on December 31, 1976 and such rights could not lawfully be divested by the trustees; (2) the trustees were derelict in their duties in failing to accumulate reserves so as to "fund" the extended liability coverate, thereby creating the conditions which induced the adoption of the 31-day resolution; and (3) the trustees failed to give adequate notice of the 31-day resolution in that they purported to make it effective upon adoption rather than making the resolution effective only after the expiration of all "accrued" or "vested" rights and in that they failed to give notice of adoption of the resolution to each plan participant. The defendants dispute each of the foregoing contentions and assert both the propriety and legality of all actions taken by the trustees in the adoption and promulgation of the 31-day resolution.

As previously noted, this action is brought pursuant to both the Labor-Management Relations Act (LMRA)(29 U.S.C. §186) and the Employees' Retirement Income Security Act (ERISA)(29 U.S.C. §§ 1001 *et seq.*). It is appropriate therefore to test the actions of the trustees herein by reference to the standards applicable under each of those acts. Under LMRA the standard of conduct required of trustees of welfare and pension funds is that they not act in an "arbitrary and capricious" manner in the administration of the trust. *Local Union No. 5 Etc.* v. *Mahoning & Trumbull County Building Trades Welfare Fund, et al,* 541 F.2d 636 (6th Cir. 1976); *Rehmar* v. *Smith,* 555 F.2d 1362, 1371 (6th Cir. 1976). Both LMRA and ERISA require that such fiduciaries manage the fund for the sole and exclusive benefit of the participants and beneficiaries. *See* 29 U.S.C. § 302 and 29 U.S.C. § 1104. Further relevant requirements of ERISA are that the trustees of such funds exercise the care and skill "that a prudent man" would exercise under like circumstances [29 U.S.C. § 1104(a)(1)(B)] and that they manage the fund in accordance with the documents governing the trust [29 U.S.C. § 1104(a)(1)(B)].

Applying these standards to the actions of the trustees in this lawsuit, the Court is of the opinion that the plaintiffs have failed to establish any grounds for judicial interferance with such actions.

As regards the plaintiffs' contention that their right to extended benefits became "vested" upon joining the Plan, it is sufficient to note that under the terms of the trust agreement the trustees were given wide discretion in the management of the trust, including the specific authority to make changes "in benefits or eligibility requirements" (Ex. 5, p. 4). This provision was as much a part of the Plan at the time the plaintiffs became participants as was the extended benefit provision itself. Under the provisions of the Plan it cannot be said that the benefits became "vested" in the true sense of that term until a claim arose that was payable under the then current provisions of the

Plan. It is undisputed in this case that all claims that arose within the 31-day period following withdrawal of the Union from the Plan were fully honored.

The evidence is quite clear that in adopting the 31-day extended benefit resolution, the trustees acted with a reaonsable and appropriate concern for the financial stability of the Plan and the long-term viability of the Fund. It is equally clear that in taking such action they acted from no corrupt or improper motive but rather that they were acting for the exclusive benefit of the total membership within the Plan.

While the establishment of reserves for payment of benefits may well be a more sound financial practice than the payment of benefits from current revenues, the former practice is not compelled nor is the latter practice prohibited by any provision in either LMRA or ERISA. Moreover, the adopting of such a funding practice would either have compelled a reduction of the benefits payable under the Plan during the accumulation of the reserve or an increase in the payments required to fund the Plan. The balancing of such considerations was within the reasonable discretion of the trustees.

As regards the plaintiffs' contention that the trustees were derelict in their duties in failing to give adequate notice of the adoption of the 31-day resolution and the reduction of the benefits thereby accomplished, it is sufficient to note that the trustees' action in this regard was taken more than nine months in advance of the withdrawal of Local 175's membership from the Plan, that a representative of Local 175 was present in his capacity as a trustee of the Fund at the meeting at which the resolution was adopted, and that the substance of the resolution was contained in the July 1, 1976 edition of the "Summary Plan Description" distributed to the membership (Ex. #8, p. 23). As to the reasonableness of this means of notification, it is sufficient to note that the Plan membership was given notice of the change in the extended benefits in the same manner as they were originally given notice regarding extended coverage.

The Court accordingly concludes that the plaintiffs have failed to establish that the conduct of the trustees herein complained of was in violation of either LMRA or ERISA. Rather, the Court concludes that such conduct was neither arbitrary nor capricious, nor was it the conduct of an imprudent person under the circumstances here shown. The Court further concludes that such conduct was taken pursuant to law, was taken pursuant to the agreements governing the Trust, and was for the sole and exclusive benefit of the total membership in the Plan.

In conclusion it may be noted that the action of union welfare fund trustees in the adoption of a resolution quite similar to the one here involved was upheld as being lawful in the recent case of *Local Union No. 5 Etc.* v. *Mahoning & Trumbull Etc.*, 541 F.2d 636 (6th Cir. 1976). Although the facts and circumstances in that case arose prior to the enactment of ERISA, the holding of the Sixth Circuit Court of Appeals in that case is nevertheless quite persuasive authority here.

An order will accordingly enter dismissing this lawsuit.

FRANK W. WILSON
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

CIV-1-77-21

Bill Pierce, G. Fred Shirley, and Randall Callahan, suing on behalf of themselves and all participants of the NECA-IBEW Welfare Trust Fund working in the jurisdiction of IBEW Local 175,

Plaintiffs,

v.

NECA-IBEW Welfare Trust Fund,

Defendant.

JUDGMENT OF DISMISSAL
(Filed April 6, 1978)

This is an action for declaratory and injunctive relief arising out of alleged violation of fiduciary duties with regard to the administration of a union welfare trust fund. The action has been duly certified as a class action and appropriate notice has been given to all members of the class pursuant to Rule 23, F.R.C.P. The case having been tried by the Court sitting without a jury and the Court having entered its findings of fact and conclusions of law, this judgment is entered in accordance therewith.

It is accordingly ORDERED that this lawsuit, including the action upon behalf of each member of the plaintiff class, be and the same is hereby dismissed.

APPROVED FOR ENTRY.

/s/ Frank W. Wilson
United States District Judge

APPENDIX C

No. 78-1242

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Bill Pierce, G. Fred Shirley and Randall Callahan, suing on behalf of themselves and all participants of the NECA-IBEW Welfare Trust Fund Working in Jurisdiction Local IBEW 175,

Plaintiffs-Appellants,

v.

NECA-IBEW Welfare Trust Fund,

Defendant-Appellee.

On appeal from the United States District Court
for the Eastern District of Tennessee.

Decided and Filed May 12, 1980

Before: Edwards, Chief Judge; Weick and Merritt, Circuit Judges.

Per Curiam. The issue in this appeal is whether the trustees of an employee welfare trust violated the Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq.* and Section 302 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186, (LMRA), by enacting a certain amendment to the trust agreement.

Plaintiffs Pierce, Shirley and Callahan are members of Local 175 of the International Brotherhood of Electrical Workers. As

a result of a contract between the Union and the "Chattanooga Division, East Tennessee Chapter of the National Electrical Contractors Association," an employer group, the plaintiffs were all participants in the defendant NECA-IBEW Welfare Trust Fund for some time between July 1, 1971, and December 31, 1976. The Fund is a multi-employer, multi-union pooled trust fund, which pays health and disability benefits, and is administered by a Board of Trustees composed of various employer and union representatives.

Under the Trust Fund Agreements, the Fund's Trustees as a matter of discretion are empowered to alter benefit rules for participation in the Fund. The controversial amendment affects benefits of employees whose unions and employers agree to withdraw from participation in the Fund.[1] Before the amendment was passed, the Agreement provided health coverage for a three, six or nine month period following the employer's withdrawal date, depending upon past contributions, measured in work-hours. The Trustees observed, however, that a previous withdrawal of a large contributor had strained the Fund's resources. They apparently had not foreseen such a contingency and had not provided reserves for such coverage. Accordingly, the Trustees amended the Agreement on January 16, 1976, effective January 1, 1976, reducing the extended coverage period to 31 days.

The July 1, 1976, edition of the "Summary Plan Description," which was distributed to plan participants, noted the change in the extended benefits. The record does not indicate any prior notification.

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[1] Plaintiffs claim that the amendment affected only eligibility requirements. We believe such an amendment also constituted an alteration of benefits.

Dissatisfied with the new plan, the Chattanooga contractors association and the local union, agreed to withdraw from the fund, and employers stopped contributing to the Fund on December 31, 1976. Plaintiffs then brought suit in the District Court for declaratory relief against the Fund on their own behalf and as representatives of a class comprised of the Local 175 members. Their prayer for relief asks that the amendment not apply to them, and that they be granted coverage for the three, six, or nine month period following the withdrawal date, in accordance with the preamended plan.

The District Judge held that applying the amendment to plaintiffs did not violate either Act. He found that the Trustees' actions were not "arbitrary or capricious" and "were for the sole benefit of the participant and beneficiaries of the trust," in accordance with the LMRA. He also found under ERISA that the Trustees acted with the degree of "care and skill 'that a prudent man' would exercise under like circumstances," and that they managed the fund in accordance with the trust documents.

Plaintiffs' claims invoke five related legal theories. Primarily, they argue that the right to post-withdrawal benefits had already vested for the three, six or nine month periods (depending upon the particular employee) because previous contributions were designed to cover those future periods. They claim that under either ERISA or LMRA, the Trustees are not permitted to pass retroactive amendments that eliminate "vested" property rights. Plaintiffs' other arguments are related to the first. Their second contention is that the trustees must give adequate notice of changes in benefits so that participants do not unwittingly and unwillingly forfeit vested rights by failing to withdraw in time from the Fund. Plaintiffs argue that if they had withdrawn, for instance, the day before the amendment came into effect, they would have been entitled to three, six, or nine months of coverage after withdrawal.

Third plaintiffs complain that, even assuming rights can be changed once they have vested, the amendment arbitrarily discriminates against employees who choose to withdraw from participation. Plaintiffs' fourth and fifth arguments are that the Trustees violated their ERISA fiduciary duties by failing to provide reserves to pay benefits of withdrawing employee participants, and by failing to report such contingent liabilities in financial statements filed with the Secretary.

We, however, agree in whole with the reasoning of the District Court opinion found at ____ F.Supp. ____ (E.D. Tenn. 1978). Accordingly, judgment is affirmed.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-1242

Bill Pierce, G. Fred Shirley and Randall Callahan, suing on behalf of themselves and all participants of the NECA-IBEW Welfare Trust Fund Working in Jurisdiction Local IBEW 175,

Plaintiffs-Appellants,

v.

NECA-IBEW Welfare Trust Fund,

Defendant-Appellee.

Before: EDWARDS, Chief Judge; WEICK and MERRITT, Circuit Judges.

JUDGMENT
(Filed May 12, 1980)

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiffs-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT.
/s/ John P. Hehman
Clerk

Issued as Mandate: August 21, 1980

COSTS: To be awarded to appellee

Filing fee	$ -0-
Printing	$801.03
Total	$801.03

A True Copy.

Attest:
Barbara J. Burns
Deputy Clerk

APPENDIX E

No. 78-1242

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BILL PIERCE, G. FRED SHIRLEY and RANDALL CALLAHAN, suing on behalf of temselves and all participants of the NECA-IBEW WELFARE TRUST FUND WORKING IN JURISDICTION LOCAL IBEW 175,
Plaintiffs-Appellants,

v.

NECA-IBEW WELFARE TRUST FUND,
Defendant-Appellee

Before: EDWARDS, Chief Judge; WEICK and MERRITT, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING
(Filed July 24, 1980)

A majority of the Court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk .

APPENDIX F

NO. 78-1242

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BILL PIERCE, G. FRED SHIRLEY and
RANDALL CALLAHAN, suing on behalf
of themselves and all participants
of the NECA-IBEW WELFARE TRUST FUND
WORKING IN JURISDICTION LOCAL IBEW
175,
Plaintiff-Appellants,

v.

NECA-IBEW WELFARE TRUST FUND,
Defendant-Appellee.

PETITION FOR REHEARING IN BANC

I express a belief, based on a reasoned and studied professional judgment, that this Appeal involves one or more questions of exceptional importance: The most important issue today facing all Hospital and Medical Plans by Joint Trusteed Funds is, What is the requirement of funding under ERISA? This key issue is presented in this case and has not been answered.

S. DEL FUSTON
609 Maclellan Building
Chattanooga, Tennessee 37402
(615) 266-6423
Attorney for Plaintiff-
Appellants

PETITION FOR REHEARING

The plaintiff-appellants petition for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure for the reason this Court adopted the reasoning of the District Court on all issues. The District Court failed to answer important issues.

Funding

One of the most important provisions of ERISA is that the Trust Fund is required to fund the objectives of the plan. Extended benefits is one of the most important objectives of this or any health fund.

The District Court avoided the key issues which were, did the Trust Fund violate its fiduciary duty by not providing for funding of the extended benefits? If so, what is the appropriate remedy?

The District Court says funding can be provided by reserves or current income. This is just the Court's definition. We insist you must have enough of one or both to pay for the extended benefits. This the Fund admitted it did not do.

What is proper funding? It is respectfully submitted the only definition by any competent authority is the Fund must maintain assets that will pay all incurred but unpaid claims which might be unreported and the accumulated extended liability for the promised extended coverage should the Fund terminate on any given date. It is believed all financially stable funds follow this rule. The holding of the District Court makes shambles out of this rule.

The Court then states at 144(a), the adoption of such a funding practice would either have compelled a reduction of the benefits payable under the plan or an increase in the payments required to the Fund. We disagree, and the statement does not answer the question of the breach of fiduciary duty which had

already occurred. There were many other alternatives, such as consideration of reducing all extended benefits for everyone in the future without a reduction of benefits or an increase in payments. This will be discussed more fully under "ARGUMENT."

The analysis of the District Court was similar as what to do after the accident, not what the liability was for causing the accident. The District Court's solution was to punish one class of innocent participants, not the driver.

The Trust Fund admitted it never funded extended benefits. Its financial records show there were none. The Trust Fund's only contention was there are no legal requirements for such funding.

Section 402(b) of ERISA (29 U.S.C. Section 1102(b)) states that every plan shall provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan. Section 404(a)(1)(D) (29 U.S.C. Section 1104(a)(1)(D)) provides that the fiduciaries shall discharge their duties in accordance with the document and instruments governing the plan. Article VII of the Decatur trust instrument is as follows:

> The trustees shall by resolution establish and carry out a funding policy and method consistent with the objectives of the trust agreement and the requirements of any applicable federal law. (182a)

Finally, ERISA requires the trust to follow the prudent man rule. For at least four years prior to 1975, the American Institute of Certified Public Accountants had stated you must fund extended benefits.

As stated, the Trust Fund contended there is no legal requirement for funding. Is that what the District Court held by silence? If so, all similar trust funds in the country will eventually

be in jeopardy. Many will shift the monies received for more benefits (which is very popular at the time); and in case of a recession or other unexpected event, it will be unable to meet its obligations at the time the extended medical coverage is most needed.

If there was a legal requirement for funding, and plaintiff-appellants insist there was, the Decatur Trust breached its duty. Section 409 of ERISA (29 U.S.C. Section 1109) provides for liability for breach of fiduciary duties. Had not the Trust Fund breached its fiduciary duty, this case would never have arisen.

None of the above facts are disputed, and the reference record pages appear in plaintiff-appellants' original brief at page 8, titled "No Funding," pages 12-13, and pages 22-23.

Extended Benefits

Of course, the District Court completely misunderstood the contention of the plaintiff-appellants in regard to advance notice. It is admitted that the plaintiff-appellants had notice of the retroactive amendment as soon as it was passed. It is understood, however, this Court holds the trustees may pass retroactive amendments that eliminate "vested" property rights. Apparently, this Court adopts the District Court's reasoning that benefits do not become vested until the time comes for the participant to actually receive the same.

In this case, the participants had worked long enough and had contributions submitted on their behalf by their employers to have earned either three, six, or nine months of extended benefits. Oftentimes, when a wage area buys into such a fund, various wage areas have accumulated sufficient funds to buy in for different periods. For example, one wage area may have sufficient funds to buy into the plan for three months extended coverage. Another area may have sufficient funds to buy into the plan for six months of coverage. And still another may have

sufficient funds to buy into the plan for as much as nine months of coverage. It is our understanding this Court holds the next day the Trust upon finding itself in some financial difficulty through the fault of the Trust Fund can retroactively state to each wage area, you bought in for just 31 days. It is respectfuly submitted, such order violates all principles of equity and contract law.

Wherefore, it is respectfully argued that this petition for rehearing be granted and the judgment of the District Court be reversed.

S. DEL FUSTON
Attorney for Plaintiff-Appellants

APPENDIX G

EXCERPTS FROM RECORD

The principal witness for the Decatur Fund was its long-time consultant, Richard N. Blomquist. In the unusual manner in which this case was tried, he was the first witness heard by the Court. Mr. Blomquist, in his discovery deposition, testified as follows:

> "The trustees have not established any requirements for funding in respect to the accrued eligibility liability." (p. 41)

> "I don't recall that I stated that. But I think that we did, in fact, certainly advise the trustees from time to time relative to the fact that this liability did exist, and that matching funds did not exist to meet..." (p. 51)

At the hearing, he testified on cross-examination as follows:

> "We recognized the fact that there were eligibility rules which had a continuing nature and that if these liabilities were to be met, then it would be necessary to have funds to meet them." (Page 38 of Blomquist Testimony)

* * *

> "What we brought to their attention was the fact that the accountants under the AICPA guidelines had, in effect, created this theoretical liability which had not existed heretofore and that funds had not been obviously provided." (Page 42 of Blomquist Testimony)

* * *

> "I do not think it can be funded or should be funded." (Page 53 of Blomquist Testimony)

* * *

On direct examination, over objection, he was permitted to testify in the field of an attorney and give a legal opinion there were no legal funding requirements. (Page 41 of Blomquist Testimony)